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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 12

THE WESTERN PACIFIC RAILROAD COMPANY, ET AL.,
Appellants

v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the Northern District of California, Southern Division

BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM

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INDEX

Page

Brief in Opposition to Appellees' Motions to Affirm .. 1

TABLE OF AUTHORITIES

CASES:

American Barge Line Co. v. *Alabama G. S. R. Co.*, 303 I.C.C. 463 (1958) 11

American Barge Line Co. v. *Alabama G. S. R. Co.*, 306 I.C.C. 167 (1959) 5, 10

American Express Co. v. *South Dakota ex rel. Caldwell*, 244 U.S. 617 (1917) 4

Arrow Transportation Co. v. *United States*, 176 F. Supp. 411 (N.D. Ala. 1959), *aff'd per curiam sub. nom. State Corp. Com'n* v. *Arrow Transportation Co.*, 361 U.S. 353 (1960) 5

Atchison, T. & S. F. Ry. Co. v. *United States*, 194 F. Supp. 438 (D. Kan. 1961) 5

Atchison, T. & S. F. Ry. Co. v. *United States*, 279 U.S. 768 (1929) 13

Atlantic Coast Line R. Co. v. *United States*, 284 U.S. 288 (1932) 6, 7, 8, 9, 10

Chicago, I. & L. Ry. Co. v. *United States*, 270 U.S. 287 (1926) 7, 8, 9

Denver & R. G. W. R. Co. v. *Union Pac. R. Co.*, 351 U.S. 321 (1956) 6

Dixie Carriers, Inc. v. *United States*, 351 U.S. 56 (1956) 16

Houston, E. & W. T. Ry. Co. v. *United States*, 234 U.S. 342 (1914) 9

Kansas City Southern Ry. Co. v. *C. H. Albers Com'n Co.*, 223 U.S. 573 (1912) 9

Little Rock & M. R. Co. v. *St. Louis, I. M. & S. Ry. Co.*, 41 Fed. 559 (E.D. Ark. 1890), *appeal dismissed*, 149 U.S. 779 (1893) 4

Louisville & N. R. Co. v. *United States*, 238 U.S. 1 (1915) 4, 13

Louisville & N. R. Co. v. *United States*, 282 U.S. 740 (1931) 9

L. T. Barringer & Co. v. *United States*, 319 U.S. 1 (1943) 4

Page

Missouri Pac. R. Co. v. *United States*, 16 F. Supp. 752 (E.D. Mo. 1936) 13
New York & N. R. Co. v. *New York & N. E. R. Co.*, 4 I.C.C. 702 (1891) 11
New York v. *United States*, 331 U.S. 284 (1947) 9
Routing, Coal from Origins on Louisville & N. R. Co., 313 I.C.C. 752 (1961) 2
Routing Restrictions Over Seatrain Lines, Inc., 296 I.C.C. 767 (1955) 5
Sioux City & N. O. Barge Lines, Inc. v. *Chicago & N. W. Ry. Co.*, 303 I.C.C. 537 (1958) 10
St. Louis S. W. Ry. Co. v. *United States*, 245 U.S. 136 (1917) 6
Thompson v. *United States*, 20 F. Supp. 827 (E.D. Mo. 1937) 13
Union Pac. R. Co. v. *United States*, 132 F. Supp. 72 (D. Neb. 1955), *aff'd in part and rev'd in part sub nom. Denver & R. G. W. R. Co.* v. *Union Pac. R. Co.*, 351 U.S. 321 (1956) 13
United States v. *Pennsylvania R. Co.*, 266 U.S. 191 (1924) 3

IN THE

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No. 598

THE WESTERN PACIFIC RAILROAD COMPANY, ET AL.,
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v.

UNITED STATES OF AMERICA, *Appellee*

On Appeal from the United States District Court for the Northern District of California, Southern Division

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BRIEF IN OPPOSITION TO APPELLEES' MOTIONS TO AFFIRM

Appellants filed their Jurisdictional Statement on October 16, 1964. The United States filed a Memorandum on November 20, 1964, stating that in its judgment this case presents substantial issues and warrants plenary examination by this Court, that it is quite doubtful whether the primary case relied on by the court below supports the result, and that if this case involves discrimination within the meaning of § 3(4), as appellants claim, the case principally relied upon by

appellants requires the elimination of that discrimination. Appellees Union Pacific, Southern Pacific and Northern Pacific (hereinafter referred to as "the railroad appellees") filed a joint Motion to Affirm on November 16, 1964, and appellee Interstate Commerce Commission filed its Motion to Affirm on December 1, 1964 (after having been granted an extension of time by Mr. Justice Douglas). This brief sets forth appellants' opposition to both motions to affirm.

The principal contention of the railroad appellees (RR 13-14)[1] seems to be that if Western Pacific's construction of § 3(4) is correct, "every other railroad in the United States, irrespective of where it is situated, also has a direct physical connection with the Northern Pacific and Union Pacific at Portland" and could invoke § 3(4). The Commission does not make any such claim in its own Motion, probably because it recognizes that several conditions must be met before § 3(4) can be invoked. The carrier making the claim of discrimination must show not only that it enjoys connecting-line status but that another carrier is being favored, that the complaining carrier competes with the favored carrier, that the complainant is being harmed in some fashion by the discrimination, and that a similarity of circumstances and conditions exists between the competing lines.[2] Quite obviously, not all railroads in the country can meet these requirements and thus invoke § 3(4). But as to those carriers which *are* connecting lines, which *do* meet the test of similarity of circumstances

[1] The Motion to Affirm of the railroad appellees is hereinafter referred to as "RR," and that of the Interstate Commerce Commission as "ICC." Western Pacific's Jurisdictional Statement is hereinafter referred to as "JS."

[2] *Routing, Coal from Origins on Louisville & N. R. Co.*, 313 I.C.C. 752, 758 (1961).

and conditions, and which *are* being discriminated against to their detriment, § 3(4) should promptly be made available so that equality of treatment can be achieved. Appellees present no policy or other reason why such discrimination should not be ended. This appeal, then, can hardly be said to present "no issue of substance" (RR 17).

Both the railroad appellees (RR 13-15) and the Commission (ICC 8-11) argue that Western Pacific is attempting to gain indirectly under § 3(4) what it cannot obtain directly under §§ 1(4) and 15(3) of the Act.[3] This is a spurious argument. In the first place, the restrictions in § 15(4) on the Commission's power to establish a through route under § 15(3) are expressly made inapplicable in the event of a § 3 violation. In other words, the Act itself provides that restrictions on the establishment of through routes and joint rates cannot be used to cloak, conceal or protect discriminations. Secondly, this Court has made clear on prior occasions that the elimination of a discrimination is not to be confused with the establishment of through routes or joint rates. As the Court said in *United States* v. *Pennsylvania R. Co.*, 266 U.S. 191, 199 (1924):

> * * * It is true that an extension of trackage rights, an enlarged common use of terminals, or the establishment of through routes and joint rates, or the

[3] The railroad appellees assert additionally (RR 14) that our construction of § 3(4) would result in a conflict between that subsection and § 3(1). There is no such conflict. The two subsections are designed to meet entirely different evils. Section 3(1) affords a remedy to *non-carriers* (shippers, localities, districts, etc.) victimized by undue or unreasonable preferential treatment, whereas § 3(4) is limited to discriminations between "connecting carriers." The question of what is or is not a connecting carrier in no way affects §3(1). It is revealing in this regard that the Commission never once mentions § 3(1) in its own Motion to Affirm.

> withdrawal of any of them, could not be ordered except upon the findings and conditions prescribed in the act. But the order complained of does not require any such thing. It requires only that the carriers shall desist from a practice which involves such use as has resulted and will result in the undue prejudice found. The order leaves them free to remove the discrimination by any appropriate action.

Similarly, in *Louisville & N. R. Co.* v. *United States*, 238 U.S. 1 (1915), a Commission order was attacked on the ground, *inter alia*, that it violated § 15 by compelling certain carriers "to make through routes and joint rates" with another line (*id.* at 18). But the Court replied:

> * * * The Commission did not * * * pass upon the question as to what was a proper switching charge as affected by the rental of the yard and the cost of operation. Neither did it direct the Appellants to establish a joint rate and a through route with the Tennessee Central. Neither did it order the Appellants to give the use of their terminals to the Tennessee Central, but only required them to render to the latter the same service that each of the Appellants furnishes the other in switching cars to industries located in and near the Yard. [*Ibid.*[4].]

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[4] See also *L. T. Barringer & Co.* v. *United States*, 319 U.S. 1, 10-12 (1943); *American Express Co.* v. *South Dakota ex rel. Caldwell*, 244 U.S. 617, 624-625 (1917). The distinction between a discrimination and the establishment of a through route is made again in one of the very cases cited by appellees (RR 14), *Little Rock & M. R. Co.* v. *St. Louis, I. M. & S. Ry. Co.*, 41 Fed. 559 (E.D. Ark. 1890), *appeal dismissed*, 149 U.S. 779 (1893). The plaintiff's line ran from Memphis to Little Rock. The principal defendant's line also ran from Memphis to Little Rock and then south. The plaintiff was attempting to force the defendant to share passenger tickets on the Memphis to Little Rock run, which

If there is a violation of § 3(4), no findings are necessary under §§ 1 or 15, because the discriminating parties are free to eliminate the discrimination in any way they choose.[5] The Commission has not, in such a case, established routes or rates but merely ordered cessation of the illegal practice. To hold otherwise would be to say that discrimination could never be eliminated if the result *might* be the creation of routes or rates which the Commission had not already affirmatively found to be in the public interest and consistent with all sections of the Act.[6] It must be remembered that both the Southern Pacific and Bieber routes are already in existence and competing one with the other; the issue is whether the railroad appellees can continue to discriminate in favor of one and against the other.

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the court would not do. But the court specifically stated, "No discrimination against the traffic carried on by the plaintiff over its own line is claimed" (41 Fed. at 563). Similarly, in *Routing Restrictions Over Seatrain Lines, Inc.*, 296 I.C.C. 767 (1955), also cited by appellees (RR 8), nothing is said that would even inferentially authorize discriminatory treatment, and § 3(4) is not mentioned anywhere in the opinion.

[5] *Atchison, T. & S. F. Ry. Co.* v. *United States*, 194 F. Supp. 438, 444 (D. Kan. 1961); *Arrow Transportation Co.* v. *United States*, 176 *F. Supp.* 411, 420 (N.D. Ala. 1959), *aff'd per curiam sub nom. State Corp. Com'n* v. *Arrow Transportation Co.*, 361 U.S. 353 (1960).

[6] In *American Barge Line Co.* v. *Alabama G. S. R. Co.*, 306 I.C.C. 167, 179 (1959), *relief denied and action dismissed sub nom. Atchison, T. & S. F. Ry. Co.* v. *United States*, 194 F. Supp. 438 (D. Kan. 1961), Commissioner Arpaia argued in dissent that a finding of discrimination requires a concomitant finding that a resulting through route would be in the public interest. The full Commission correctly rejected his contention.

To repeat, §§ 1 and 15—which assume the absence of discrimination—are irrelevant.[7] Western Pacific is seeking only the elimination of discriminations already engaged in by the railroad appellees. Western Pacific has in no way accepted the Commission's findings with respect to issues raised under § 1(4); it has simply chosen to rely wholly upon § 3(4), which it believes fully supports its prayer for relief.

In regard to the term "through route," the railroad appellees assert (RR 12) that Western Pacific "would have the Court adopt a different definition for the same term if Section 3(4) of the Act is involved" than it would for § 15(4). First, the term "through route" does not appear in § 3(4); if the term applies to § 3(4) at all, it applies only because this Court referred to it in *Atlantic Coast Line R. Co.* v. *United States*, 284 U.S. 288, 293 (1932). So we are not speaking here of a legislative term of art specifically used in § 3(4). Secondly, this Court itself has recognized that even in a § 15 case, "through route" is a flexible concept without precise meaning for every situation. *Denver &*

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[7] It is interesting that while the railroad appellees are insistant in this part of their Motion that §§ 3 and 15 are intimately connected and must be similarly interpreted, they are just as insistent elsewhere (RR 9) that *St. Louis S. W. Ry. Co.* v. *United States*, 245 U.S. 136 (1917), is not relevant to this case because it involved § 15 rather than § 3. Also, in urging the relevance of § 15(4), the appellees conveniently ignore the admonition in that subsection that the Commission shall, in prescribing through routes and when consistent with the public interest, "give reasonable preference to the carrier by railroad which originates the traffic." Western Pacific loses each year about 2,500 cars of traffic which either originate or terminate on its line (not to mention an additional 22,500 cars of "bridge" traffic) by virtue of the very discrimination complained of in this case (JS App. A, pp. 4a-5a, 17a).

R. G. W. R. Co. v. *Union Pac. R. Co.*, 351 U.S. 321, 327 (1956) (see JS 14 n.12). Thirdly, there simply has been no occasion for the courts in prior cases to consider the specific situation presented here in relation to a "through route." It is noteworthy, however, that the interpretations in those cases were expanding rather than restrictive or limiting. Fourthly, we agree with the United States in its Memorandum that a careful examination shows *Atlantic Coast Line* to have been speaking of "through route" in the sense of through service physically available, and in that sense, Western Pacific qualifies.[8] And finally, as we have already pointed out (JS 15-16), Western Pacific qualifies even if the "physical connection" test is applied, since Western Pacific is an integral part of a route which does connect with the railroad appellees at Portland.[9]

The railroad appellees (RR 10-11) and the Commission (ICC 11-12) contend that *Chicago, I. & L. Ry.*

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[8] Western Pacific does not concede, as the railroad appellees say it does (RR 3 n.6), that through routes do not exist. We made quite clear in our Jurisdictional Statement (JS 13, 15-16) that a "through route" *does* exist here as that term was applied in *Atlantic Coast Line* and as it should be applied if § 3(4) is correctly interpreted. The only "concession" made by Western Pacific (JS 13) was that no "through route" exists here as that term is interpreted in this case by the Commission and the District Court—an interpretation which we contended is wholly unwarrented.

[9] Western Pacific did not say in its Jurisdictional Statement that it has "a direct physical connection with the Northern Pacific and Union Pacific at the Portland gateway * * *," as the railroad appellants assert (RR 12). Western Pacific said (JS 15) that even if a physical connection were necessary, the Bieber route connects with Northern Pacific and Union Pacific at Portland. The Bieber route must be considered as a whole unit because of the purpose for which it was constructed, and Western Pacific is the middle link and a connecting line within that route. The appellees have not rebutted this argument.

Co. v. *United States*, 270 U.S. 287 (1926), relied on by appellants, involved no question of connecting-line status. That is not so. After a brief introductory argument, the first point presented to this Court by the appellants in that case was entitled, "Unlawful discrimination cannot exist unless there is a physical connection by the carrier alleged to be guilty of the discrimination with the railroad or shipper claiming to be discriminated against, or a service being performed for the railroad or shipper discriminated against through the medium of joint routes or joint rates."[10] The entire argument for thirteen pages of the brief was then devoted to this point,[11] and each of the other parties argued it in detail.[12] To say that connecting-line status was not raised or considered is absurd; it was, in fact, the precise issue to which the Court's opinion was addressed. In addition, *Chicago, I. & L. Ry Co.* could hardly have been overruled by *Atlantic Coast Line* since, as appellees concede (RR 10-11), one Justice wrote both opinions, and he did not even refer to the first opinion in the second one. The two opinions do not conflict but instead lend support to one another.

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[10] Brief for Appellants, *Chicago, I. & L. Ry. Co.* v. *United States*, October Term 1925, No. 150, p. 25.

[11] *Id.* at 25-38. Appellants, for example, made such statements as this: "In this case the persons whom the Commission find are discriminated against are not located upon, or adjacent to the lines of the Pere Marquette, Monon or Michigan Central; they are not serviced in any manner by these lines and these lines do not reach or come in contract with them, and there is no joint arrangement with the Lake Erie and Western for serving them." *Id.* at 38.

[12] Brief for Interstate Commerce Commission, pp. 22-31; Brief for the United States, pp. 13-20; Brief for Appellee, the Chicago, Lake Shore and South Bend Railway Company, pp. 20-31.

This is not to say, as the railroad appellees assert (RR 10), that we rely "solely" upon the *Chicago, I. & L. Ry Co.* case. We also rely on the fact that *no* legislative history (including any cited by appellees) supports the interpretation of § 3(4) which they seek in this case. On the contrary, this Court repeatedly has made clear that § 3 must be liberally interpreted to achieve the primary legislative purpose of eliminating rate discrimination in all its forms.[18] We rely in addition on the fact that *no* decision of *any* court, including this one, specifically precludes the application of § 3(4) to a carrier such as Western Pacific.

We have already answered in our Jurisdictional Statement (JS 8-9, 12-15) most of the contentions made by appellees (RR 10-12; ICC 10-11) about *Atlantic Coast Line R. Co.* v. *United States, supra,* 284 U.S. 288. We need add only two points. First, the complaint in that case was not an attempt, as the Commission asserts, "to cancel a through route * * * " (ICC 11), nor was the Clinchfield already participating in through routes and joint rates with the Georgia & Florida, as the railroad appellees state (RR 11). On the contrary, the Georgia & Florida had built an extension to connect with an intermediate carrier (the Piedmont & Northern), and before the extension was ever opened, Atlantic Coast Line published a tariff that would have prevented joint rates between it and the Georgia & Florida from becoming effective over the extension, with the result that the so-called

[18] *E.g., New York* v. *United States,* 331 U.S. 284, 296 (1947); *Louisville & N. R. Co.* v. *United States,* 282 U.S. 740, 749-750 (1931); *Houston, E. & W. T. Ry. Co.* v. *United States,* 234 U.S. 342, 355-356 (1914); *Kansas City Southern Ry Co.* v. *C. H. Albers Comm'n Co.,* 223 U.S. 573, 597 (1912).

"through route" under appellees' definition never came into being.[14] Secondly, the Commission itself has labeled as erroneous a contention that *Atlantic Coast Line* should be construed to mean that the term "connecting line" can only be applied to lines making up a through route as that term is used in Section 15(4) of the Act. The Commission squarely held, "It is obvious that no such restrictive definition was intended [by the Court]." *Sioux City & N. O. Barge Lines, Inc.* v. *Chicago & N. W. Ry. Co.*, 303 I.C.C. 537, 548 (1958).

The Commission states (ICC 12) that "So far as we are aware, no other railroad (or water carrier) has contended that it is a 'connecting line' within the meaning of Section 3(4) in the absence of a physical or business connection within the meaning of *Atlantic Coast Line R. Co.* v. *United States, supra.*" Yet in 1958, Division 3 held that to require through routes as a condition precedent to a finding of discrimination under § 3(4) would leave that statute unnecessarily limited in scope.[15] The full Commission subsequently held that certain barge lines were "connected" with the defendant rail carriers under § 3(4) even though not physically connected to them,[16] and earlier in the same proceeding, the full Commission had also found that the barge lines enjoyed no arrangement with the defendant rail carriers for continuous carriage of the

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[14] See the *Atlantic Coast Line* opinions of the District Court, 48 F.2d 239, 240-241, 243, 245, and of this Court, 284 U.S. at 291, 294.

[15] *Sioux City & N. O. Barge Lines, Inc.* v. *Chicago & N. W. Ry. Co., supra,* 303 I.C.C. at 547-550.

[16] *American Barge Line Co.* v. *Alabama G. S. R. Co., supra,* 306 I.C.C. at 172.

commodities involved.[17] In these water carrier cases the Commission thus rejected the very proposition that it supports here—namely, that there must be either a physical connection or a holding out of through service. And it did so, we believe, because of this old but still valid and important premise:

> When, therefore, the statute declares that there shall be no discrimination in rates and charges between connecting lines, it can only mean that no difference or distinction shall be made in rates that shall coerce the public to employ one competitor to the exclusion of another, or deprive one competitor of business that under freedom of selection by the public would be given to it, and thus create a monopoly in favor of another competitor. Unless this effect is given to the language of the statute it is only a meaningless enactment. [*New York & N. R. Co.* v. *New York & N. E. R. Co.*, 4 I.C.C. 702, 720 (1891).]

No one can deny that Western Pacific and Southern Pacific compete. No one can deny, as the Commission aptly put it (ICC 3), that Northern Pacific and Union Pacific "have (with isolated and minor exceptions) steadfastly attempted to keep such routes commercially closed from the inception of the Bieber route over 30 years ago." No one can deny that the discrimination against Western Pacific is depriving that carrier of traffic and depriving shippers of competitive rates. Surely, then, as the Commission said long ago, the statute is "only a meaningless enactment" unless it is interpreted to do away with such discrimination.

The railroad appellees refer, though only briefly (p. 4), to a finding by Division 2 of the Commission in

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[17] *American Barge Line Co.* v. *Alabama G. S. R. Co.*, 303 I.C.C. 463, 468-471 (1958).

this case that "the sought routes would, in many instances, short-haul the Northern Pacific and the Union Pacific without their consent, in violation of Section 15(4) * * *." The facts are these. Section 15(4), which protects under certain circumstances a railroad's right to retain its longest possible haul, contains four exceptions. One of these is that § 15(4) does not apply when the short-hauled railroad is violating § 3.[18] Not only is the issue of short-hauling improperly injected in connection with proceedings under § 3(4), but the practice presently engaged in by Union Pacific and Northern Pacific of voluntarily short-hauling themselves with Southern Pacific is itself strong evidence that this alleged issue has no substance.[19] Western Pacific is entitled under § 3 to receive the same rate treatment enjoyed by its competitor, Southern Pacific. *Western Pacific is not requesting Union Pacific or Northern Pacific to handle a single carload of traffic one mile less (or more) than they are presently handling comparable traffic with Southern Pacific.* Congress has provided in the § 15(4) exception that under these circumstances, carriers cannot defend against a

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[18] Section 15(4), 49 U.S.C. § 15(4), provides in pertinent part: "in establishing any such through route the Commission shall not (*except as provided in section 3 of this title* * * *) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad * * *" (emphasis added).

[19] For example, Union Pacific joins Southern Pacific in joint rates on Los Angeles traffic and thereby surrenders such traffic at Portland, even though it has its own longer and more satisfactory route all the way to Los Angeles. (Tr. 201, 202, 204-206, 213; Ex. 1, 26, 31.) Through its subsidiary, Oregon Electric, Northern Pacific short-hauls itself by joining in through rates and routes with Southern Pacific at Portland rather than at Eugene, Oregon, directly south of Portland. (Ex. 1, 26, 31.)

charge of discrimination by claiming that the result would be a short haul.[20] The situation is thus comparable to that in *Louisville & N. R. Co.* v. *United States, supra*, 238 U.S. 1, in which the Court carefully pointed out that once a carrier undertakes a course of action, the course must be followed without discrimination to others:

> * * * Having made the Yard a facility for many purposes and to many patrons, such railroad facility is within the provisions of § 3 of the statute which prohibits the facility from being used in such manner as to discriminate against patrons and commodities. * * * Whatever may have been the rights of the carriers in the first instance; whatever may be the case if the Yard was put back under the protection of the proviso to § 3, the Appellants cannot open the Yard for most switching purposes and then debar a particular shipper from a privilege granted the great mass of the public. [*Id.* at 19.]

Union Pacific and Northern Pacific, having already chosen to establish Portland as the common point of interchange with Southern Pacific and the Bieber route, cannot discriminate with impunity against Western Pacific but must instead grant equal treat-

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[20] See *Union Pac. R. Co.* v. *United States*, 132 F. Supp. 72, 80 (D. Neb. 1955), *aff'd in part and rev'd in part sub nom. Denver & R. G. W. R. Co.* v. *Union Pac. R. Co.*, 351 U.S. 321 (1956) ("If the prejudice and preference shown by the evidence falls within the prohibition of Sec. 3(1) the Commission may correct it irrespective of whether the factual situation authorizes the order under Secs. 15(3) and 15(4) heretofore considered"); *Thompson* v. *United States*, 20 F. Supp. 827, 830 (E.D. Mo. 1937); *Missouri Pac. R. Co.* v. *United States*, 16 F. Supp. 752, 756 (E.D. Mo. 1936). In *Atchison, T. & S. F. Ry. Co.* v. *United States*, 279 U.S. 768 (1929), the Court held that the Commission could cancel an unreasonable tariff even though the practical result was to establish a route by which the carrier short-hauled itself.

ment. Section 15(4) is therefore irrelevant to this case, and we think there is an implied concession to this effect in the failure of the railroad appellees to argue the point after referring to it once in their Motion.

The railroad appellees argue that since there are fewer small railroads today than previously (RR 8-9), and since only 7% of the railroad companies in existence 75 years ago are still in existence (RR 9 n.14), "there is less need for expanding the definition of the term 'connecting line.'" Nothing could demonstrate more dramatically than appellees' own figures the contention in our Jurisdictional Statement (JS 8-9, 17-18) that some means must be found in the face of an ever-increasing consolidation of services and facilities to protect the smaller lines, which in many cases offer the sole competition to larger lines. "Connecting-line" status is one answer to the merger trend, because it forbids discrimination that may well put a smaller carrier out of business. Connecting-line status does not guarantee success for the smaller line, but it does guarantee that competition will be governed by true economic forces and not by artificially-imposed and discriminatory restrictions. The figures set forth by appellees graphically prove the necessity for the interpretation of § 3(4) sought by appellants.[21]

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[21] The assertion that the "Commission's order will in no way impede the existing operation of the Bieber route" (RR 8) is not supported by the facts. Manifestly, the failure to order an end to the appellees' discrimination seriously impedes the existing operation of the Bieber route. It is forcing Western Pacific to surrender, except for switch operations, a tremendous volume of traffic which either originates or terminates on its line. It is foreclosing Western Pacific from competing for more than 25,000 carloads of otherwise competitive traffic, all with the result that the route is not being used to anywhere near its actual physical capacity. (JS App. A, p. 17a.) The Examiner specifically held that the higher rates on the Bieber route "precludes" shippers from using that route. (*Id.* at p. 4a.)

Obviously, it is no answer to say that the Commission has the power under § 5(2) to impose conditions to a consolidation (see ICC 12-13). Section 5(2) does not even come into play until a consolidation is voluntarily submitted to the Commission. A current discrimination cannot be defended on the ground that at some future date the Commission may attempt to correct the violation of law in some other proceeding. Moreover, the elimination of parallel facilities now taking place in the railroad industry is coming about not only through consolidations but through the unilateral abandonment of trackage and facilities, and through the adverse competitive impact of discriminatory rates, as in this case. Section 5(2) has no application to these situations.

We strongly support at least one statement in the Commission's brief: "* * * it is the compatibility of the definition employed [of § 3(4)] * * * with the statutory scheme which is the real issue here" (ICC 10). That is indeed the issue. And in facing it, is this Court going to support a restrictive definition of "connecting lines" that would perpetuate the discrimination now being practiced? No statutory language, legislative history, or prior decision requires such a result. We urge, rather, that the Court carry out the intent of Congress by interpreting § 3 so as to outlaw "discrimination in all its forms"[22] and promote the competition that both the Interstate Commerce Act

[22] *Dixie Carriers, Inc.* v. *United States*, 351 U.S. 56, 60 (1956).

and the Bieber route itself were created to protect and enhance.

Respectfully submitted,

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